United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

No. 74-1674

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

VIACOM INTERNATIONAL INC., *et al.*,
Plaintiffs-Appellees,

vs.

TANDEM PRODUCTIONS, INC.,
Defendant-Appellant.

Appeal From the United States District Court for the Southern District of New York.

REPLY BRIEF FOR DEFENDANT-APPELLANT.

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REPLY BRIEF FOR DEFENDANT-APPELLANT.

ARGUMENT.[1]

I

Viacom's Theory of Its Case Is an Inconsistent and Self-Destructive One.

Viacom's argument in this case is a paradoxical one. It is grounded variously upon the oral contract found to have been made before the FCC "financial-interest rule" became effective and which does not provide for assignability or upon the written contract which was executed after the rule became effective, but which did

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[1]The "Brief For Plaintiffs-Appellees" is referred to herein as "*Viacom Br.*" The parties and the record, including the findings, are referred to as they are in the "Brief For Defendant-Appellant" which, in turn is here referred to as "*Tandem Br.*"

provide for assignment. So, when Viacom desires to avoid the invalidating effect of the financial-interest rule, it stands upon the oral contract [see, *e.g.*, *Viacom Br.*, 23] but, when assignability is essential to its immediate point it moves over to the written contract. [See, *e.g.*, *Viacom Br.*, 38.]

In order to support the judgment Viacom must have it both ways, for it did not get the syndication and distribution rights to "All In The Family" from Tandem, their owner, but from CBS Enterprises, a subsidiary of CBS, Tandem's grantee. [368 F. Supp. at 1266.] Accordingly, Viacom got nothing from CBS Enterprises or CBS if the latter's acquisition of those rights was ineffective, as it was, because of the financial-interest rule [see, *Tandem Br.*, 13-15] or if those rights were acquired and held, as they were, under terms and conditions that, as a matter of law, made them non-assignable. [See, *Tandem Br.*, 17-18.] Neither the oral nor the written contract satisfies both of these necessary conditions. That is why Viacom needs to have it both ways.

But, Viacom cannot have it both ways. Even if the written contract was an outgrowth of the oral one, it had a life and standing of its own. The two agreements are separate from and independent of each other—*a fortiori* so if an effective oral agreement was never reached. [See, *Tandem Br.*, 20-22.] The two agreements are materially different in their terms and conditions, especially in respect of assignability and subjection to the financial-interest rule; they were agreed to at widely different times; the written one did not exist when the oral one was made, and when the former one was executed it was manifestly designed to supersede the oral one. [See, *Tandem Br.*, 5-9, 16-17.] The two had no concurrent, but only their respective separate existence. Neither one depended upon the other

or needed it for whatever vitality it may otherwise have had.

Viacom, however, needs both agreements co-existing as one. It does not, however, argue that they *are* one, presumably because it recognizes that they are not. It has not taken a position as to the source of the rights it put in issue and sought to enforce. Was the source the oral contract or the written one? Of course, to recover, Viacom had the burden to prove both assignability and validity under the financial-interest rule. It proved neither, because depending upon which contract it stands on at the given moment it proved only one or the other.[2]

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[2]Viacom's brief is noteworthy also for the extent it leaves unchallenged and fails to make any direct reply to quite a few of the contentions made by us. Thus, we find no traverse in that brief of these propositions urged by us:

(a) The rights in dispute were not assignable unless agreed to be so. [*Tandem Br.*, 17-18.]

(b) The financial-interest rule invalidated an acquisition made after its effective date. [*Tandem Br.*, 17. Also, *United States v. Murtagh*, 4 Cir., 190 F.2d 407; and compare the other cases cited, *Tandem Br.*, 15 (fn. 8).]

(c) The written contract was executed after the rule became effective. [*Tandem Br.*, 5, 7, 8-9, 13.]

(d) The alleged oral agreement did not provide for assignability. [*Tandem Br.*, 6-7.]

(e) The financial-interest rule could not be avoided by antedating the contract. [*Tandem Br.*, 14-15.]

(f) It had to be assumed that the facts offered to be proved could be proved. [*Tandem Br.*, 10 (fn. 7).]

(g) What was purportedly assigned to Viacom was not merely the syndication and distribution rights, but the CBS distributorship or, as Viacom itself says [*Viacom Br.*, 2] "the syndication and distribution business" of CBS Enterprises (which acquired that business from CBS). [*Tandem Br.*, 18-19.]

(h) The matter of approval of program-content "is a matter of extreme importance and materiality to a contract for production and exhibition of a television program . . ." [*Tandem Br.*, 22.]

(i) Tandem has received nothing under the contract for which it has not paid the price, *i.e.*, the "standard" syndication and distribution fees of CBS. [368 F. Supp. at 1268-1269; *Tandem Br.*, 11.]

IV

The Offered Antitrust Defense Was Cognizable, Because It Went to the Illegality of the Very Provision of the Contract Enforced and Protected by the Judgment.

First: Viacom's argument that the Tandem-CBS agreement was not intrinsically illegal [*Viacom Br.*, 9] misses the point not only of our contention [*Tandem Br.*, 11-13], but as well that of the cases, particularly *Kelly v. Kosuga*, 358 U.S. 516, upon which Viacom relies. The point of *Kelly*, and the other cases cited by Viacom, is not that illegality under the antitrust laws, to be a defense to a contract action, must appear from the face of the contract itself, but rather that it must appear that enforcement of the contract will result in enforcing or giving effect to the contractual provision in which the asserted illegality inheres; in short, that the very conduct made illegal is not given the Court's blessing. *Kelly* itself fully recognizes this distinction.[3] [See, 358 U.S. at 518-521.] Viacom's argument, if accepted, would destroy it.

Viacom seeks to limit *Kelly* to illegality appearing on the face of the contract itself or to be found "within its

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[3]The distinction between the instant case and *Kelly* is a two-fold one. Here, the judgment gives effect to the illegality by enforcing the very provision in which the illegality inheres; and, also unlike *Kelly* there is here no unjust enrichment arising from retention of the commodity sold without paying for it.

There is also a third distinction—that between a voluntary and a coercive participation in the illegal scheme. In the latter case, *pari delicto* is not a bar to the defense of illegality by the one coerced. [See, *e.g.*, *Columbia Nitrogen Corp. v. Royster Company*, 4 Cir., 451 F.2d 3, 15-16.] In the instant case the offer of proof embraced coercion of Tandem by the economic or market power of CBS [368 F. Supp. at 1276; *Tandem Br.*, 4, 10]; indeed, at the relevant time in the then existing situation, CBS was the only market available to Tandem for network exhibition of its program. [*Tandem Br.*, 5.] To get access to that market Tandem had to cede to CBS what it wanted to retain—the syndication and distribution rights.

four corners." [*Viacom Br.*, 17.] It thus tries to exclude application of the doctrine of illegality to enforcement of a contractual provision that is itself illegal because it gives effect to conduct made illegal by the antitrust laws. That effort at limitation cannot survive a perceptive reading of *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 259-261, and the Supreme Court's ungrudging approval of *Continental* in *Kelly, supra*, 358 U.S. at 520-521. Strongly supportive of our position also, is *Associated Press v. Taft-Ingalls Corp.*, 6 Cir., 340 F.2d 753, which is discussed in more detail at the end of Point II, *Second, infra.*

The antitrust laws are not merely an expression of economic policy. They are penal statutes, violation of which is a Federal crime. [15 U.S. Code, sec. 1, *et seq.*] It would be a travesty to hold—and in realistic effect that is the ultimate meaning of the holding Viacom asks this Court to make—that one who is circumspect and adroit enough to keep evidence of his criminality out of the contract by which his illegal purpose or scheme is effectuated is immune to the penal sanctions of the antitrust laws. The contention is a strained and unrealistic one.[4]

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[4]Many, if not in fact most, criminal violations of the antitrust law are and certainly may be committed without any overt evidence of them in the documentation of the illegal scheme. An example that comes readily to mind is the acquisition, under a contract quite innocuous upon its face, of the stock or assets of another business, the planned or intended effect of which is to suppress or cut down competition with the acquirer. That would be a clear violation of the antitrust laws if the suppression was substantial—a fact that would have to be proved by evidence *aliunde* the contract. [15 U.S. Code, sec. 18.] So, too, would be an outwardly innocent contract of acquisition made in an attempt to attain or preserve a monopoly of the relevant market. [15 U.S. Code, sec. 2.] Yet, according to Viacom's theory, the contract of acquisition in either case would be enforceable by an appropriate decree of a Federal court, because no hint

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Viacom's effort also flies into the teeth of the decisions. In *Continental* the Supreme Court explicitly made the distinction upon which we rely. [*Tandem Br.*, 11-12.] In *Kelly* the Supreme Court characterized *Continental* as the "leading case here in which the defense was allowed . . ." [358 U.S. at 520.] It did so in discussing the petitioner's contention that the difference between earlier cases rejecting a defense based on a violation of the antitrust laws (an independent violation in those cases, not, as here, one inhering in the contractual provision sought to be enforced) was merely that in the earlier cases the asserter of the defense was not a party to the unlawful contract or scheme. In the course of that discussion the Supreme Court pointed out the true distinction, which was the one made in *Continental* and the one we have made in the instant case [*Tandem Br.*, 10-12] and which we make in this brief.[5]

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of the underlying or contextual illegality was permitted to creep into the contract.

The fact is that the economic or market context in which a contract is made or in which it must operate has a great deal, even everything, to do with its legality under the antitrust laws.

[5]What the Court said in this regard in *Kelly* is this:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold . . .
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> "The petitioner recognizes the import of the holdings in *Connolly*, *Wilder* and *Small*, but he argues that they involve situations where a person not party to any unlawful agreement sought to defend against the action on the grounds of the seller's unlawful acts; where the purchaser is party to the unlawful agreement and the agreement bears some relation to the suit, the petitioner claims he is not to be held to the purchase price . . .
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> * * *
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> "In any event, an analysis of the narrow scope in which the defense is allowed in respect of the Sherman Act indi-

The other cases from the Supreme Court cited by Viacom [see *Viacom Br.*, 17] were all before the Court and were taken into account in *Kelly;* all of them were expressly mentioned. [See, 358 U.S. at 477-478.] Obviously, the latest expression from that Court upon this subject requires the conclusion that nothing in these earlier cases conflicts with the distinction given effect in *Continental* and reaffirmed in *Kelly*. There can be no doubt in this regard, for at least a couple of those cases reinforce the distinction to which we have

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cates that the principle of distinction is not what the petitioner claims it to be. The leading case here in which the defense was allowed is *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486, much relied on by petitioner. There the Voight company had made purchases from Continental, a corporation which existed only as a selling agent for numerous wallpaper companies doing business as a pool and selling at prices, alleged to be excessive and unreasonable, fixed through the pool agreement. The Court was of opinion that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be *to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act*. 212 U.S. at 261. . .

"The scope of the defense of illegality under the Sherman Act goes no further . . . Past the point *where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided* by the overriding general policy, as Mr. Justice Holmes, put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' . . ."

* * *

"Accordingly, while the nondelivery agreement between the parties could not be enforced by a court if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price . . . in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." [358 U.S. at 518-521. Italics ours.]

adverted.[6] According to Viacom "whatever inconsistency may have existed between *Continental*" and other cases [*A. B. Small Co. v. Lamborn & Co., supra,* 267 U.S. 248; *D. R. Wilder Mfg. Co. v. Corn Prods. Co.,* 236 U.S. 165; *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540] "has been definitively resolved by . . . *Kelly* . . . and *Bruce's Juices* . . ." [*Viacom Br.,* 22.] Beyond saying that there was no inconsistency, we need not quarrel with that statement. The posited resolution, as we have shown, was in favor of the distinction that brought the case at bar within *Continental* and the approval in *Kelly* of the *Continental* rule.

Second: The decisions from other Federal courts upon which Viacom relies are in no better case. They all follow—at least they purport to follow *Kelly v. Kosuga,*

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[6]For example, in *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 755, the Court cogently stated the distinction, thus:

> "It is urged that holdings under the Sherman Antitrust Act supply an analogy for allowing this defense under the Robinson-Patman Act . . . This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends *which would be consummated by the judgment sought,* the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute. *Continental Wall Paper Co. v. Louis Voight & Sons Co.,* 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486. *Cf. Sola Electric Co. v. Jefferson Electric Co.,* 317 U.S. 173, 63 S.Ct. 172, 87 L.Ed. 165. But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the 'doctrine that "where a statute creates a new offense and denounces the penalty or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes" ' *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.,* 236 U.S. 165, 174, 175, 35 S.Ct. 398, 59 L.Ed. 520, 525, 526, Ann. Cas. 1916A 118; *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679. [330 U.S. at 755. Italics ours.]

supra, 358 U.S. 516.[7] So, they do not militate against the distinction we have drawn. If they do, they are without precedential authority. In the nature of things the decisions of the Supreme Court must prevail.

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[7]An example of the mass is *Columbia Nitrogen Corp. v. Royster Company, supra,* 451 F.2d 3. There, the gist of the substantive holding against the defense of antitrust violation was simply that *Kelly* precluded interposition of the defense. [451 F.2d at 14.] The Court of Appeals recognized, however, that, as in *Kelly,* the defense was maintainable ". . . where 'the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act . . .'" [451 F.2d at 15.] That, of course, is the exact distinction we draw and which was drawn in *Kelly.* It is the distinction that makes the defense maintainable in the case at bar, for the judgment here enforces the tying provision of the contract, the "precise conduct made unlawful by the Act . . ."

Another example of the kind of cases cited by Viacom is *Atlantic Richfield Company v. Malco Petroleum, Inc.,* 6 Cir., 471 F.2d 1258. There, the defense to an action upon a promissory note was that the note was given as part of a tying transaction. Actually, it was given to evidence a loan made at the time the tying contract was executed; it was not given for any obligation created by or arising out of the tying agreement. The Court of Appeals, relying mainly on *Kelly v. Kosuga, supra,* 358 U.S. 516, rejected the defense, but in doing so recognized the different case presented when the judgment would enforce the illegal provision. The Court said:

> "Sometimes a party will claim the existence of such an illegal tying arrangement as a defense to a suit on a debt or contract in furtherance of such an arrangement. The use of this defense, however, is not favored and has been limited by the Supreme Court strictly to situations where enforcement of a debt or contract would make the courts 'a party to the carrying out of one of the very restraints forbidden by the Sherman Act.' *Kelly v. Kosuga* . . . The reason for such a narrow limitation on the use of the tying claim as a contract defense is the general policy of the law to bar a party from benefiting from his own wrong or gaining a windfall. As Mr. Justice Holmes phrased it, there is a general policy 'of preventing people from getting other people's property for nothing when they purport to be buying it.' *Continental Wall Paper Co. v. Louis Voight & Sons Co.* . . .
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> "This Circuit has applied the *Kelly* distinction between contracts violative of the antitrust law in and of themselves

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Viacom's argument that the antitrust defense will be upheld only when the asserted illegality appears on the face or within the four corners of the contract is disposed of by *Associated Press v. Taft-Ingalls Corp., supra,* 340 F.2d 753. In that case the defense was upheld against an effort to enforce payment for the executory part of a tying arrangement. The Court of Appeals in doing that, pointed out that a "tying arrangement or condition need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct." [340 F.2d at 753.] The existence or illegality of such an arrangement was not found from anything in the contract in *Associated Press,* but from *extrinsic* evidence of practice, economic power, and refusal to separate the tied product. [350 F.2d at 759-768.] The Court said that "[i]t is true that no tying arrangement is spelled out expressly in the contract . . ." [340 F.2d at 764.] Nonetheless the defense was upheld, because, having found a violation of the antitrust

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and separable legal transactions which are valid. *Associated Press v. Taft-Ingalls Corp.,* 340 F.2d 753, 759, (6th Cir.), cert. denied 382 U.S. 820, 86 S.Ct. 47, 15 L. Ed.2d 66 (1965); *Kentucky Rural Electric Cooperative Corp. v. Moloney Electric Co.,* 282 F.2d 481 (6th Cir. 1960), cert denied, 365 U.S. 812, 81 S.Ct. 692, 5 L.Ed.2d 691 (1961). In the *Associated Press* case, this court refused to enforce a contract mandating purchase of unwanted and unnecessary services from the Associated Press by a Cincinnati newspaper which had ceased publication. This court found that the contract itself was violative of the Sherman Act and the District Court could not enforce the contract and thereby force the purchaser to violate the Act. In that case the seller was seeking to enforce an executory contract of sale of the tied product." [471 F.2d at 1260-1261.]

The *Kentucky Rural Electric* case referred to by the Court is also cited by Viacom. It, too, makes the distinction we make; consequently, the defense of antitrust violation was sustained, because, as at bar, the judgment would enforce the illegal provision.

The *Associated Press* case also makes this distinction and accordingly upheld the defense. [*Associated Press v. Taft-Ingalls Corp.,* 6 Cir., 340 F.2d 753, 765, 768-769, *cert. den.* 382 U.S. 820.]

laws, the Court would not enforce the precise conduct made unlawful by the Act; *Kelly* was cited and quoted in support of that holding. [340 F.2d at 769.]

Third: Viacom argues that Tandem should not reap the benefits of the contract without paying for them. The argument is unavailable to it in the circumstances of this case. Tandem has paid all it was required to pay for whatever benefits it may have received. It has not refused to pay whatever was agreed to be paid for network exhibition or for any completed syndication or distribution. Its refusal goes only to the syndication and distribution provision so far as it is still *executory*. Consequently, this is not a case of Tandem getting "other people's property for nothing when they purport to be buying it . . ." [Holmes, J., dissenting in *Continental Wall Paper Co. v. Louis Voight & Sons, supra,* 212 U.S. at 271; *Kelly v. Kosuga, supra,* 358 U.S. at 520-521.] Just as was the case in *Associated Press, supra,* 340 F.2d at 769, Tandem "has paid for all [Viacom] services received by it . . ."

The property here involved is the television series "All In The Family." So far as it has been produced at all, it is Tandem's property. All profits from its distribution or syndication were to go to *Tandem* after deduction by CBS of its expenses and standard fees.[8] [368 F. Supp. at 1268-1269. Exhibit 65A.] There is not the shred of showing or contention here that CBS or Viacom, as the case may be, has not gotten every jot and tittle of that consideration. Tandem has not gotten another's property without paying for it, but only the profits from exploitation of its own property, paying CBS or Viacom the sums called for by the contract.[9]

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[8]There is no issue here between the parties respecting the network exhibition of the program.

[9]More accurately, CBS or Viacom paid itself out of the proceeds belonging to Tandem.

If the offered defense were proved, and it must be assumed it could have been [368 F. Supp. at 1276], the effect would be to show the illegality of the provision for syndication and distribution. That being so, it is not a consideration to which Viacom is entitled. It is plainly no reason to enforce an illegal bargain that it was bargained for. [*Cf., Viacom Br.*, 13-14.] So to hold would be to stultify the rule against enforcing illegal agreements. Most illegal provisions in a contract are bargained for. An illegal consideration is not the kind of consideration that will support an enforceable contract. [*Hazelton v. Sheckels*, 202 U.S. 71, 78; *United States v. Bayer Company*, S.D.N.Y., 135 F. Supp. 72, quoting *Continental Wall Paper, supra*, 212 U.S. at 262.]

Fourth: It is argued that to permit the antitrust defense to be litigated would "unreasonably prolong and complicate contract litigation." [*Viacom Br.*, 15.] The question here is not contract litigation generally or in the bulk, but *this* litigation. What is unreasonable about permitting the making of a showing that, if sound in fact and law, will determine the litigation in question? Courts, after all, sit to determine controversies over the legal rights and duties of the parties, to the extent that the controversies are within their jurisdiction and that jurisdiction is appropriately invoked.

Viacom's fear that a complicated antitrust defense will be raised in every contract case, at least every such case against CBS [*Viacom Br.*, 16], is the typical advocate's argument *ad terrorem*. There is really nothing to fear, even by CBS, unless there is no basis for the defense. It is only the sham defense that needs to be considered a threat, for, if it is not sham, due process requires that the party be heard. So far as the sham defense is concerned there is nothing for the courts

to fear. Modern procedural devices—*e.g.*, discovery, motions for summary judgment, motions to strike, offers of proof—are adequate to expose and quickly deal with the sham defense. The legitimate defense, however, is entitled to be heard.[10]

Viacom's fears arise, in part at least, from the assumption that the antitrust defense to a contract action extends to any violation of the antitrust laws by the plaintiff. The true rule—the one invoked in the instant case—as has been amply shown, upholds the defense only when it goes to the illegality of the specific provision or conduct sought to be enforced. That, too, supplies assurance that the antitrust defense can and will be kept within proper bounds.

In *Dickstein v. duPont*, 1 Cir., 443 F.2d 783, cited by Viacom, prolongation and complication of contract disputes was mentioned as one of the policy reasons why the antitrust defense had not met with much judicial encouragement. [443 F.2d at 786.] The Court in spelling out that policy reason was not ruling such defenses completely out, but was merely pointing to the limited factual context in which they were cognizable; for, it concluded its discussion in that regard with this significant comment—which, incidentally, Viacom omits from its quotation of *Dickstein* [*Viacom Br.*, 17]:

> "Despite these policy reasons against litigating antitrust defenses in contract disputes, *Kelly* does not hold that no such defenses can be raised. [Cit. to *Kelly, supra*, 358 U.S. at 519.] But antitrust

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[10]The procedure used by Judge Gurfein in the instant case is a good example. He was of the opinion that the defense was not good in law. By use of the procedural devices of the sort referred to he was able quickly to reach and determine the question of law posed by the defense. It is no criticism of the efficacy of the procedure he followed and of its utility in preventing *unnecessary* consumption of time and effort that, in our deferential submission, he erred in the conclusion at which he arrived.

> defenses are allowed only in cases where the intrinsic illegality of the contract is so clear that enforcement would make a court party to the precise conduct forbidden by the law. [Citing, *inter alia, Continental Wall Paper Co., supra,* 212 U.S. 227, and *Associated Press, supra,* 340 F.2d at 769.] In the instant case, the alleged antitrust violation does not even seem to be clear to appellant, much less the court."

In our case, however, the facts offered to be proved [A. 675a-684a] established a clear violation of the antitrust laws in that Tandem was compelled to grant CBS distribution and syndication rights, which it did not want to do, as a condition of access to the substantial part of the interstate network exhibition market controlled by CBS. That, in the language of *Dickstein,* was "the precise conduct forbidden by the law." [See *Tandem Br.,* 10; and *cf. Associated Press, supra,* 340 F.2d at 756-760.] To give effect to that conduct, as the court below did, by enforcing the contractual provision embodying it, again in the language of *Dickstein,* "would make a court party to the precise conduct forbidden by the law . . ." [443 F.2d at 786.]

III

No Effective Oral Agreement Came Into Being, Because Agreement Was Not Reached on, Inter Alia, the Important Matter of Program-Content Control.

First: As we have said, Viacom seeks to avoid the invalidating effect of the FCC financial-interest rule by standing upon the 7/70 oral contract as the one by which CBS acquired its interest in Tandem's program.[11]

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[11]A heretofore undetected error in our opening brief [*Tandem Br.,* 11] has put us in the position of saying what we did not mean to say. In the eighth line of the second paragraph on page 11 the phrase "FCC rule" should have been "antitrust laws." So phrased, the argument there made is the one we still make

That tactic, of course, subsumes that an oral agreement was effectively made. It was not, because agreement was not reached upon several of the terms and conditions of the agreement. [*Tandem Br.*, 6.] Of the five subjects that, as the District Court found, were left open, there can be no real or substantial doubt that agreement was not reached upon the undeniably important and material matter of which of the parties would have the right to control what went into the program. [*Tandem Br.*, 6-7, 20-22.] That in itself was enough to have kept any binding oral agreement from coming into being. [*Tandem Br.*, 21.]

In respect of program control, all that the District Court found [368 F. Supp. at 1269] or that Viacom offers in opposition to our argument is that the parties agreed upon a standard by which they were to be guided, *i.e.*, as the District Court said, ". . . the program would ridicule the far 'left' as well as the far 'right' . . ." But suppose that a proposed piece of dialogue or stage business or a scene or sequence that Tandem wanted but CBS, or its legitimate successor in interest, did not want—who would have the power or right to decide whether it should or should not be included in the finished production? That is the reality of control of program-content; that is the important element of such control, as is shown by the District Court's description of what was left open—"how much CBS would control the content of the programs . . ." [368 F. Supp. at 1269]; that is the question that was not answered by any agreement that both the left and right would be ridiculed.[12]

[See, Point II, *supra*] about the cognizability of an antitrust defense in a contract action. Viacom's answer understandably deals with what we seemed to mean. [*Viacom Br.*, 22.]

[12]The matter of control of program-content was especially important in our case because of the controversial nature of "All

(This footnote is continued on next page)

It may be that in the written contract, which was executed after the FCC financial-interest rule became effective, a measure of content-control was vested in CBS. [Exhibit 65A (paragraph 19), Appendix (Exhibit Volume I), 0920, 0926.] That, however, did not add to the validity of the oral agreement or, if it did, it did not make it effective as of a date any earlier than execution of the written agreement. It cannot be properly said that the outstanding and open question about program-content control was resolved any sooner. To avoid the FCC rule, Viacom needs an agreement that was in effective existence before the rule. The written agreement cannot perform that office, because the matter was left open and unagreed to at least until after the FCC rule became effective. [*Tandem Br.*, 13-17.]

Second: Various of the negotiators may have expressed themselves by way of a conclusion of fact and law that a "deal" had been closed. That, however, tells us nothing about what the terms and conditions of that deal were. Indeed, it does not even tell us that in fact and law a *contract* was made. Those conclusional expressions, therefore, are not evidence that any particular term or condition was agreed upon. Contracts are made by the interaction of an offer and acceptance, not by an asseveration that one was made. [Restatement

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In The Family." There are many controversial subjects that are not concerned with the philosophies of left and right, but upon which feelings run high. Suppose Tandem desired to include a sequence based on the current or recent busing demonstrations or riots in Boston, and CBS or Viacom objected because it thought that, even though proponents and opponents were given equal time or treatment, the presentation would still offend a substantial part of the viewing public, or simply because the subject was too unfunny to be included in what was supposed to be a comedy series, or because as played it was poorly done—who then, would decide whether and to what extent the scene would be included? No answer to that question is found in the standard of ridiculing both left or right; and without an answer to it or similar questions, the important matter of control of program-content was not resolved.

Contracts, secs. 19, 22.] An expression of proposal of or concurrence in a "deal" that does not tell us what the deal is can hardly be said to make a contract or to be agreement to some term or condition not otherwise agreed to.

Even so, it is clear from Exhibit 87 [Appendix, 0951], as Viacom recognizes by quoting it [*Viacom Br.*, 31], that the "deal was closed on the basis of [Cohn's] memo to Norman Lear . . ." Indeed, that was the District Court's finding. [368 F. Supp. at 1269 (fn. 7).] The memo is in evidence as Exhibit 76. [A., 0938-0939.] It is silent about the five open matters that, the District Court found, were resolved by it. An affirmative finding of the existence of a fact, as to which the evidence adduced in support is silent, is clearly erroneous.[13]

IV

The Oral Contract Was Non-Assignable and, so, Cannot Be the Effective Source of Viacom's Claimed Rights.

Viacom argues that the assignment provision in the written contract permitted the assignment made to it. [*Viacom Br.*, 38.] It does not, however, deny our proposition that absent such a provision there would be no right to assign. [*Tandem Br.*, 17-18.] Viacom's rights depend upon a valid assignment. Since there was no right to assign the oral agreement, Viacom must and does invoke the assignment provision of the written contract. But, that contract was executed at a time that made it subject to the FCC financial-interest rule.

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[13] ". . . If a finding is not supported by substantial evidence, it will be found to be clearly erroneous . . ." [Wright and Miller, *Federal Practice and Procedure*, vol. 9, p. 735, sec. 2585.] ". . . Vague and conclusory assertions can not justify ignoring objective facts . . ." [*Hodgson v. Fairmont Supply Co.*, 4 Cir., 454 F.2d 490, 495.] Here, the objective fact is the Cohn memo.

[*Tandem Br.*, 13-15.] On the other hand, if a retreat to the oral agreement is essayed, encirclement of Viacom is completed by that agreement's non-assignability.

V

The Distribution License Sought to Be Enforced Has Been Novated.

Viacom says it "is not seeking to enforce the terms of an earlier agreement despite a later agreement. Viacom is seeking to *enforce* the distribution license set forth in the 7/10/70 Agreement and proved the earlier 7/70 Oral Agreement solely to establish when CBS had acquired the license."[14] [*Viacom Br.*, 35. Italics ours.] That statement is a contradiction in terms. If the distribution license was acquired by the written agreement, it was acquired *after* the financial-interest rule had gone into effect. If what is sought to be enforced is an earlier license, it *is* the oral agreement that will have to be enforced. Viacom does not escape the novating effect of the written agreement [Tandem Br., 15-17] by denying in one breath what it affirms in the next.

Viacom does not say there was not a novation, but only that the effect of it was merely to prevent enforcement of the discharged agreement and that it is not seeking to enforce that agreement. [*Viacom Br.*, 35-36.] So it must follow that it is the written agreement that is being enforced—and Viacom insists that is the

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[14]Viacom's practice of referring to the written agreement, which was actually executed 9/30/71 [Court's Exhibit 3, A., 316a-317] as the "7/10/70 Agreement" is a feeble ploy. It is, in any event, no answer to the fact that antedating did not take it out of the invalidating reach of the FCC financial-interest rule. [*Tandem Br.*, 13-17.]

case. [*Viacom Br.*, 35.] The FCC financial-interest rule, therefore, is squarely applicable. The earlier oral agreement, if it ever existed, has been novated out of existence, as Viacom evidently recognizes by insisting it is not seeking enforcement of it. [*Tandem Br.*, 15-17.]

VI

The Error, if Any, in Excluding the Communications Between Tandem and Its Attorneys Raises No Question Here Needing to Be Answered.

First: There is really no need to get into the intricacies of the law of attorney-client privilege. We may assume, for purposes of the argument, that the communications excluded from evidence on account of that privilege may now be deemed to be part of the record on appeal. [*Viacom Br.*, 46.] The indicated assumption does not advance Viacom's case. Viacom seems to be content merely to argue that the communications were not privileged; it presents no argument as to the significance of the communications or how or why they support the judgment. [*Viacom Br.*, 46-50.] The theory that permits the exhibits to be considered is that an appellee may assert "any ground in support of his judgment" to be found in the record. [*Dandridge v. Williams*, 397 U.S. 471, 475 (fn. 6).] Neither we nor this Court is required to guess at what Viacom's brief-writers had in mind in the way of supporting the judgment by these communications. In that regard there is no point made to which an answer is required.

Conclusion.

The judgment appealed from should be reversed.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On October 1, 1974, I served the within

APPELLANT'S REPLY BRIEF in re: "Viacom International Inc. vs. Tandem Productions, Inc.", in the United States Court of Appeals for the Second Circuit, No. 74-1674;

on the attorneys in said action, by placing 5 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

HUGHES, HUBBARD & REED
OTIS PRATT PIERSALL
One Wall Street
New York, New York 10005

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 1, 1974, at Los Angeles, California

Jean Drennen

Service of the within and receipt of a copy thereof is hereby admitted this 31 day of October, A.D. 1974.

Proof of Service Enclosed